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May 28, 2007

Pamela Creedon, Executive Officer
California Regional Water Quality Control Board
Central Valley Region
11020 Sun Center Drive, #200,
Rancho Cordova, California 95670-6114

**RE: Comments Regarding Draft Clean up and Abatement Order for Newmont
USA Limited in Grass Valley**

Dear Ms. Creedon:

We are grateful that the Water Board has issued a Draft Clean Up and Abatement Order ("Order") against Newmont, and we welcome the chance to express our support. Our citizens are very appreciative of the Board's decision to place the responsibility for this contamination on Newmont, where it belongs. The Drew Tunnel Clean Up and Abatement Order is a wonderful response to this serious threat to our community. We encourage the Water Board to require Newmont to meet all of the requirements set forth in the Order, and to do so in a timely manner. Requiring Newmont to remove its acid mine drainage from Grass Valley's Wastewater Treatment Plant, as soon as possible will be a great service to our citizens.

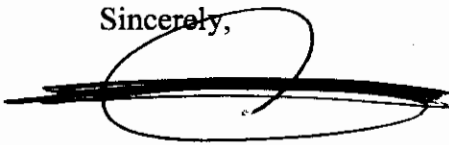
Grass Valley is a city with a population of only 12,900, but it has been burdened with the cost of treating acid mine drainage from Newmont's property for the past 4 years – to the tune of more than \$2,000,000 dollars. And there is no end in sight. The sheer volume of the flow, an average of 450,000 gallons per day, takes up 20% of our Wastewater Treatment Plant's capacity. This capacity was intended to accommodate Grass Valley's population, and permit future growth. Instead, much of this capacity is taken up with Newmont's acid mine drainage – and the cost of treatment is paid by our ratepayers, not by Newmont.

Because the acid mine drainage contains contaminants that the Plant wasn't designed to treat, including manganese, the discharge has had serious, negative consequences on the plant's ability to function. Newmont's acid mine drainage also threatens the City's ability to meet our NPDES permit requirements in March of 2008.

We assume that Newmont will make certain comments denying responsibility during the comment period, and are aware of comments made by Newmont by letter dated April 19, 2007. In the attached memo, we would like to address some of the points raised by Newmont's letter thereby addressing some of the objections which we anticipate Newmont will make.

Representatives of the City are available to help address any questions that may be raised during the comment period. Representatives will also be present at the hearing to address questions and make comments. Grass Valley looks forward to the Regional Board's issuing the Clean Up and Abatement Order and stands by to be of any assistance to the Regional Board and Newmont in the outlined process to remove the acid mine drainage from the City's Wastewater Treatment Plant.

Sincerely,

A handwritten signature in black ink, appearing to be "Mark Johnson", written over a horizontal line.

Mark Johnson
Mayor of Grass Valley

c: Ken Landau, Assistant Executive Officer
Frances McChesney, Legal Counsel
Diana Messina, Senior WRC Engineer
Steve Rosenbaum, Senior Engineer Geologist
Jeff Huggins, WRC Engineer

City of Grass Valley
Comments Regarding Newmont's April 19, 2007 Letter

We believe that the Board has accurately stated the facts in its Draft Clean Up and Abatement Order. In its letter of April 19, 2007, however, Newmont makes four statements that are inaccurate or misleading.

1. The Geography of the Site

First, Newmont mischaracterizes the physical geology and property ownership interests of the site from which the contamination emanates and discharges. Newmont claims that the City's Wastewater Treatment Plant ("WWTP") sits on two parcels of land which the City purchased from Empire Star Mines Company and the Boyce Thompson Institute for Plant Research, and that the Drew Tunnel drainage is located on the west parcel. The City's property consists only of the surface estate. Newmont's subsidiaries and related companies retained the subsurface property rights, including mineral rights, for both parcels. These subsurface rights are currently held by New Verde Mines LLC, a Newmont subsidiary. The City was precluded from mining on the properties, and in fact agreed under the terms of the 1972 deed that the parcel would revert back to Newmont in the event the City ever conducted any mining activities.

The Drew Tunnel does indeed daylight on the West parcel where portions of the WWTP are located, but Newmont's implication that the contamination itself somehow only arises from the surface features of the City's parcel defies logic, the hydrology present and prevailing property law. The point at which the Discharge surfaces onto the City's property is one end of a mining feature, commonly known as the Drew Tunnel of the Watt Incline of the Massachusetts Hill Mine. The Tunnel itself, the source of the contamination, runs for miles underground and drains a large area surrounding the WWTP site.

Legally, the City is simply an innocent landowner which has the misfortune to have purchased the parcel upon which Newmont's tunnel daylights. In similar situations, California courts, as well as the Ninth Circuit, have distinguished between the liability of the innocent landowner and the party actually responsible for the contamination. See Lincoln Properties v. Higgins, 823 F.Supp. 1528, 1539-44 (E.D. Cal. 1992) (County was "innocent landowner" even though defendants' contamination leaked from County's sewers and wells); Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 946 (9th Cir. 2002) ("it is doubtful whether [a defendant] may be considered PRP merely as a result of operating [a] municipal sewer system.")

2. The City's Discovery of the Drew Tunnel Discharge

Second, Newmont's discussion of the City's discovery of the mine drainage in 2000 is misleading and omits a number of relevant facts. Newmont implies that the City deliberately misled the Board by withholding information about the Drew Tunnel drainage. Newmont states that the City didn't report the drainage to the Board or try to work with Board pre-construction on regulatory considerations and options. Newmont then curiously states that if the City had acted differently, "ensuing events and regulatory triggers could have been avoided."

Prior to the expansion of the WWTP which began in 199-2000, a spring or drainage existed outside of the WWTP fence line. This spring or drainage had existed there in an apparently natural form (covered by foliage) for as long as any City employees can recall. This spring had historically been thought to be natural drainage which had been observed by Regional Board staff members during periodic plant inspections. Its existence has never been concealed, nor had the source of the spring drainage been fully explored. The construction of the plant expansion fully exposed the "spring" to be mine drainage and the fact was immediately communicated to the Regional Board and other regulators once the circumstances were evident.

Newmont's statement that "regulatory triggers could have been avoided" appears to suggest that once the City discovered and confirmed this was mine drainage it could have (or should have) simply ignored the 500,000 gpd of contaminated water. Apparently concealing this discovery from the Regional Board would have meant there was no need to treat it. This proposition is simply absurd. Upon recognizing that the water from the Drew Tunnel was mine drainage, the City immediately notified the Board and several other regulatory agencies. The City also notified Newmont. Once the City determined that the water was contaminated, it sought the Board's guidance and shortly thereafter began treating the discharge.

Newmont's attempt to "blame the victim" seems somewhat disingenuous and without any legal basis.

3. Newmont is Liable for the Discharge of Waste into Waters of the State

The City agrees with the Regional Board that Newmont is a Discharger under California Water Code sections 13304 and 13267. To the extent that Newmont may raise objections in the future, the City welcomes the opportunity to address them. Newmont's April 19, 2007 letter does not specifically address the issue of its status as a Discharger, but does contest its liability under several other environmental statutes. The City firmly believes that Newmont is not only a Discharger under the Water Code, but is responsible for the contamination under other environmental statutes as well. Since Newmont addressed these other statutes in the letter, the City would like to address these points.

Newmont denies that it is the owner of the Massachusetts Hill Mine or the Drew Tunnel, and denies that it ever operated either. But Newmont mischaracterizes both the legal nature of its ownership of mineral rights, and the facts of its long term operations in and around Grass Valley.

The Massachusetts Hill Mine is only one of the many mines that Newmont owned and operated in Grass Valley. The Massachusetts Hill Mine was originally worked in the latter half of the 1800's. The Massachusetts Hill Mine was consolidated into the North Star Mines early in the 1900's, along with Massachusetts Hill Quartz Mine, Granite Hill, New Rocky Bar, Rocky Bar, New York Hill, Skadden Flats, Ford & Riley, Stockbridge, Boston Ravine, Stockbridge PM (Placer Mine), Great Britain, Polkinghorn, Twilight Strike, Southern Larimer Star and the Massachusetts Hill Mine Dump. The North Star Mine was further consolidated with the Empire Mine in 1929. Newmont, operating under the name of the Empire Star Mines Company, owned and operated the Empire-Star Mines, including the Massachusetts Hill Mine, from 1929 to 1957. From 1929 to 1957, Newmont exercised its surface and subsurface property rights to mine hundreds of

millions of dollars in gold from the Empire-Star Mines. After 1957 Newmont operated under many names over the years, but management and control of the Grass Valley Empire-Star Mines properties, including the Drew Tunnel and related mine workings, has remained in Newmont's hands since 1929.

When Newmont closed down active mining in the 1950's, it decided to let the Empire-Star Mines fill with water. The natural result of the discontinuation of pumping the mines was that some of the mine water would flow to the ground surface through abandoned mine features. Hundreds of thousands of gallons of that contaminated water now daily discharges onto the City's property from the Drew Tunnel.

Newmont claims that the mineral rights (which Newmont concedes are owned by New Verde Mines LLC, a Newmont subsidiary), "do not equate to ownership of the underground mine workings." This is incorrect. The sole reference on which Newmont relies notably under cuts this contention. This treatise on mineral rights states that "the majority rule afford[s] the mineral owner the absolute ownership of the underground spaces." 83 A.L.R. 2d 665 at Section 6[a] (emphasis added).

Newmont ignores this reference along with substantial California and Federal law that belies their position. Newmont's subsurface property rights are full-fledged subsurface property rights. Newmont holds these rights to the exclusion of others, including the holders of surface rights. In California: "The owner of real property may divide his lands horizontally as well as vertically, and when he conveys the subsurface mineral deposits separately from the surface rights, or reserves them from a conveyance of such surface rights, he creates two separate fee simple estates in the land, each of which has the same status and rank." Nevada Irr. Dist. v. Keystone Copper Corp., 224 Cal.App.2d 523, 527 (1964).

Mineral rights constitute a separate estate in real property. George v Manhattan Land & Fruit Co., 51 F.2d 28, 32 (5th Cir. 1931). Where these rights have been severed, a party having possession of the surface is not presumed to have possession of the subsoil. Stowers v Huntington Dev't & Gas Co. 72 F.2d 969, 972 (4th Cir. 1934). "The owner of the fee simple interest in minerals or mineral rights has the exclusive right to the use and enjoyment of an excavated cavity so long as the mine has not been exhausted or abandoned." International Salt Co. v. Geostow, 878 F.2d 570 (2d Cir. 1989), related reference, Integrated Waste Services, Inc. v. Akzo Nobel, Salt, Inc., 921 F. Supp. 1037 (W.D.N.Y. 1996), *aff'd in part, vacated in part on other grounds*, Integrated Waste Services, Inc. v. Akzo Nobel, Salt, Inc., 113 F.3d 296, 27 Env'tl. L. Rep. 21138 (2d Cir. 1996). Courts have generally held that the owner of the mineral rights is the owner of the underground workings and spaces made by the removal of the minerals. Lillibridge v. Lackawanna Coal Co. (1891) 143 Pa. 293, 22 A 1035, 13 L.R.A. 627, 24 Am. St. Rep. 544 (ownership of minerals in place was a corporeal hereditament and was the same as the ownership of land); Moore v. Indian Camp Coal Co. (1907) 75 Ohio St. 493, 80 NE 6, (the ownership of minerals in place accords the mineral owner the right to use, as he may see fit, the space left by their excavation).

Newmont also mischaracterizes its status as an "operator" of the mine workings from which the discharge flows. Newmont suggests that because gold mining may have ceased in the Massachusetts Hill Mine by 1901, Newmont never "operated" either the Mine or the Drew Tunnel. Newmont ignores that the Drew Tunnel is operating as it was

designed – by draining portions of the Massachusetts Hill Mine. The Regional Board has the authority to pursue enforcement action against the owner of, or party responsible for, an inactive or abandoned mine. People v. New Penn Mines, Inc., (1963) 212 Cal.App.2d 667, 673-674. The California Water Code implements the Clean Water Act, and the Fifth Circuit has held that under the Clean Water Act, tunnels and mine workings constitute point source pollution. Sierra Club v. Abston Construction Co., Inc., 620 F.2d 41, 44-47 (5th Cir. 1980). The Tenth Circuit has held that under the Clean Water Act that the owner of mine workings could be held liable for pollutants from an abandoned mine shaft even when the owner had never conducted operations on the property. Sierra Club v. El Paso Mines, Inc., 421 F.3d 1133 (10th Cir. 2005). The Clean Water Act and CERCLA stand *in pari materia*, and both impose liability on site owners of property where discharges occur. *See e.g. United States v. Carr*, 880 F.2d 1550, 1553 (2nd Cir. 1989). The Second Circuit has held that the current owner of a site may be held liable under CERCLA even if he does not actively participate in the management of the site or contribute to the release. New York v. Shore Realty Co., 759 F.2d 1032 (2^d Cir. 1985).

Newmont also actively operates the Empire-Star Mine facility because it continues to exercise control over the facility. The Eighth Circuit upheld CERCLA liability imposed on a corporate president, citing his authority to determine method and timing of disposal of wastes, and actual exercise of the authority. Control Data Corp. v. SCSC Corp., 53 F.3d 930, 937 (8th Cir 1995); see FMC Corp. v. Aerojet Indus., Inc., 998 F.2d 842, 846 (10th Cir 1993). Newmont's decision making authority, its active environmental investigations, evaluations of potential profitability, and sales of portions of the Empire-Star Mine facility, establish that Newmont is in fact an operator under environmental statutes.

4. Ownership of the Water is Irrelevant

Fourth, Newmont claims that the City “owns” the water emanating from the Drew Tunnel portal. Even if true (which the City does not concede) this is irrelevant. “Ownership” of the water is not at issue here – the issue is who has contaminated the water. The case that Newmont relies on concerns a downstream owner's right to appropriate water. It specifically distinguishes this issue from the issue of liability for pollution – although, ironically for Newmont, it suggests that the upstream owner may not injure the downstream owner by “muddying and pollution of the water.” Holmes v. Nay, 186 Cal. 231, 241 (1921) (emphasis added). The situation in Grass Valley has nothing to do with rights of appropriation, but with responsibility for discharging waste to the waters of the state. Newmont's discussion of the ownership of the water is irrelevant and misleading.

5. Conclusion

We thank you for the opportunity to comment on the Board's Draft CAO, and welcome the opportunity to respond to any questions the Board may have.